

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of WAYNE C. BROWN and DEPARTMENT OF THE NAVY,
NAVAL AIR STATION, Alameda, Calif.

*Docket No. 97-471; Submitted on the Record;
Issued December 18, 1998*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
BRADLEY T. KNOTT

The issues are: (1) whether the Office of Workers' Compensation Programs properly found that an overpayment of compensation of \$8,089.30 was created; (2) whether the Office properly denied waiver of the overpayment; (3) whether the Office properly found that appellant could repay the overpayment by deducting \$150.00 every four weeks from his continuing compensation; and (4) whether the Office met its burden of proof in terminating appellant's compensation as of April 27, 1997.

In the present case, the Office accepted that appellant sustained precipitation of a myocardial infarction causally related to his federal employment.¹ He stopped work on May 5, 1987 and began receiving compensation at the augmented rate for claimants with dependents. By letter dated March 8, 1996, the Office made a preliminary determination that an overpayment of compensation of \$8,089.30 occurred during the period December 31, 1989 to June 23, 1993. The Office indicated that appellant did not have a dependent during that period and, therefore, was not entitled to augmented compensation. With regard to fault, the Office stated that appellant was found not to be at fault in creating the overpayment.

By decision dated July 11, 1996, the Office finalized the overpayment determinations. In a letter dated March 17, 1997, the Office advised appellant that it proposed to terminate his compensation. By decision dated April 24, 1997, the Office terminated appellant's compensation effective April 27, 1997.

The Board has reviewed the record and finds that the Office properly determined that an overpayment of \$8,089.30 was created.

¹ The Office also accepted multiple subluxations with osteoarthritis as a consequence of the hospital stay associated with the myocardial infarction.

Under 5 U.S.C. § 8110, a claimant is entitled to augmented compensation at the rate of 75 percent of his monthly pay if he has a dependent. Under this section a dependent includes an unmarried child under the 18 years of age; the Office regulations implementing the Federal Employees' Compensation Act, however, provides that augmented compensation will continue if the unmarried child is a student under 23 years of age.² There does not appear to be any dispute that appellant's son was 23 years of age on December 31, 1989 and no other dependents have been claimed. During the period December 31, 1989 to June 26, 1993, appellant was paid augmented compensation, although he had no eligible dependents. Accordingly, the Board finds that the Office properly found an overpayment of compensation was created. The Office determined that during this period the difference between what appellant was paid at the augmented rate of 75 percent and what he should have received at 66 2/3 of monthly pay, was \$8,089.30.

The Board further finds that the Office properly denied waiver of the overpayment.

Section 8129(b) of the Act³ provides: "Adjustment or recovery by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of the Act or would be against equity and good conscience."⁴ Thus the finding that appellant is without fault in creating the overpayment does not itself require waiver of the overpayment. Appellant is entitled to waiver of the overpayment only if recovery would neither defeat the purpose of the Act nor be against equity and good conscience. The guidelines for determining whether recovery of an overpayment would defeat the purpose of the Act or would be against equity and good conscience are set forth, respectively, in sections 10.322 and 10.323 of Title 20 of the Code of Federal Regulations.

Section 10.322(a) provides, generally, that recovery of an overpayment would defeat the purpose of the Act if recovery would cause hardship by depriving the overpaid individual of income and resources needed for ordinary and necessary living expenses and, also, if the individual's assets, those which are not exempt from recovery, do not exceed a resource base of \$3,000.00 (or \$5,000.00 if the individual has a spouse or one dependent).⁵ Section 10.323 provides that recovery of an overpayment would be against equity and good conscience if: (1) the overpaid individual would experience severe financial hardship in attempting to repay the debt, with "severe financial hardship" determined by using the same criteria set forth in 20 C.F.R. § 10.322; or the individual, in reliance on the payment which created the overpayment, relinquished a valuable right or changed his position for the worse.

With respect to whether recovery of the overpayment would defeat the purpose of the Act, the Office received evidence regarding appellant's monthly income and expenses in an

² 20 C.F.R. §§ 10.107(b); 10.5(a)(25).

³ 5 U.S.C. §§ 8101-8193.

⁴ 5 U.S.C. § 8129(b).

⁵ To establish that recovery would defeat the purpose of the Act, appellant must show both that he needs substantially all his income to meet ordinary and necessary living expenses, and that his assets do not exceed the established resource base; see *Robert E. Wenholz*, 38 ECAB 311 (1986).

April 23, 1996 overpayment recovery questionnaire (OWCP-20) and a May 26, 1996 telephone conference. Based on this information the Office determined that appellant's income consisted of his compensation payment of \$1,594.00 every four weeks, or \$20,722.00 per year, which results in a monthly income of \$1,726.83. Based on the detailed list of expenses provided by the Office, the monthly expenses totaled \$1,529.34.⁶ Appellant, therefore, had \$197.49 in income over expenses. The Board finds that the Office properly concluded that appellant would not be deprived of income and resources needed for ordinary and necessary living expenses.⁷

With respect to whether recovery of the overpayment would be against equity and good conscience, there is no evidence that appellant relinquished a valuable right or changed his position for the worse in reliance on the excess compensation payments he received. Accordingly, the Board finds that the Office did not abuse its discretion in denying waiver of the overpayment in this case.

The Board further finds that the Office properly required repayment by withholding \$150.00 every four weeks from appellant's continuing compensation.

Section 10.321 of the Office's regulations provides:

"Whenever an overpayment has been made to an individual who is entitled to further payments, proper adjustment shall be made by decreasing subsequent payments of compensation, having due regard to the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any resulting hardship upon such individual."⁸

As noted above, the Office prepared a detailed list of appellant's monthly income and expenses, which indicated that appellant had approximately \$200.00 in income exceeding expenses. The Board finds that the Office gave due regard to appellant's financial circumstances in determining the rate of repayment in this case.

The Board further finds that the Office met its burden of proof in terminating compensation.

Once the Office accepts a claim, it has the burden of justifying termination or modification of compensation. After it has been determined that an employee has disability causally related to his employment, the Office may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.⁹

⁶ The Office found expenses to be \$1,519.34, but the actual amount based on the listed expenses is \$1,529.34.

⁷ See *James Lloyd Otte*, 48 ECAB ____ (Docket No. 95-672, issued February 14, 1997) (where the claimant had approximately \$200.00 of monthly income in excess of expenses).

⁸ 20 C.F.R. § 10.321.

⁹ *Patricia A. Keller*, 45 ECAB 278 (1993).

As noted above, the Office accepted both precipitation of a myocardial infarction as well as a consequential subluxation condition as causally related to employment. With regard to the myocardial infarction, the Office referred appellant for examination by Dr. Leonard A. Goldberg, a cardiologist. In a report dated January 20, 1997, Dr. Goldberg provided a history and results on examination. He concluded that appellant did not have any limitations with respect to his previous job and opined that appellant was capable of returning to his date-of-injury position. The Board finds that this opinion represents the weight of the medical evidence. Dr. Goldberg provided a medical opinion, based on a complete background, that appellant was not disabled for work due to his heart condition. There is no probative contrary evidence of record.

The Board notes that an attending cardiologist, Dr. Alan R. Cabrera, had stated in a treatment note dated September 18, 1996 that appellant's "stress for workmen's comp[ensation] has significantly impaired [appellant's] ability to regain a particular work status. He continues on workers' comp[ensation] and should remain so." Dr. Cabrera also indicated that appellant "feels fine, when not stressed." The basis for Dr. Cabrera's statement that appellant should remain on compensation is not clear from this note. To the extent that Dr. Cabrera believed that a return to work would produce "stress" that could aggravate his condition, this is not sufficient to support continuing entitlement to compensation. It is well established that the possibility of a future injury does not constitute an injury under the Act and, therefore, no compensation can be paid for such a possibility.¹⁰ Dr. Cabrera does not provide a reasoned opinion based on a complete background that appellant continued to have a disabling heart condition causally related to his employment. He submitted an April 2, 1997 report, which noted that appellant had complained of multiple symptoms of arrhythmias as documented by Holter monitors, which must be "take[n] into account when reviewing his disability." Dr. Cabrera does not provide an opinion as to causal relationship with employment.

The Board accordingly finds that the weight of the evidence rests with Dr. Goldberg on the issue of whether appellant continued to have a disabling heart condition causally related to employment.

With regard to appellant's back condition, the Board finds that the evidence establishes that appellant did not have a continuing employment-related back condition. The Office found that a conflict existed on the issue of whether December 11, 1995 x-rays taken by Dr. Michael D. Tobey, a chiropractor, revealed any continuing subluxations. Dr. Tobey diagnosed cervical subluxations in an August 22, 1996 report, while an Office medial adviser opined in a September 20, 1996 report, that x-rays did not reveal a subluxation. To resolve the conflict, the case was referred to Dr. Allen T.C. Au, a Board-certified radiologist. In a report dated December 12, 1996, Dr. Au reviewed x-rays dated August 9, 1988 and December 11, 1995. He diagnosed scoliosis in the upper thoracic spine and degenerative joint disease which had progressed slightly. Dr. Au found no evidence of subluxation in either x-ray.

It is well established that when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and

¹⁰ *Gaetan F. Valenza*, 39 ECAB 1349, 1356 (1988).

based on a proper factual and medical background, must be given special weight.¹¹ The Board finds that Dr. Au's report establishes that appellant did not have any continuing subluxations. The conditions noted by Dr. Au, scoliosis and degenerative joint disease, have not been accepted as consequential injuries of the myocardial infarction. It is appellant's burden of proof to establish any additional back conditions as causally related to employment.¹² Although Dr. Tobey did provide a report dated March 24, 1997, opining that the degenerative joint disease was a direct result of the subluxation complex, this report is of no probative value because Dr. Tobey cannot be considered a physician under the Act. Section 8101(2) of the Act provides that the term "physician" ... includes chiropractors only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist."¹³ The weight of the evidence indicates that a subluxation did not exist and, therefore, Dr. Tobey is not considered a physician under the Act.

The Board, therefore, finds that the medical evidence establishes that appellant did not continue to have an employment-related disabling condition. The Office accordingly met its burden of proof in terminating compensation effective April 27, 1997.¹⁴

¹¹ *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

¹² See *Kathryn Haggerty*, 45 ECAB 383 (1994) (appellant has burden to establish a specific condition is causally related to the employment injury).

¹³ 5 U.S.C. § 8101(2).

¹⁴ The jurisdiction of the Board is limited to evidence that was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c). The Board cannot consider new evidence submitted on appeal.

The decisions of the Office of Workers' Compensation Programs dated April 24, 1997 and July 11, 1996 are affirmed.

Dated, Washington, D.C.
December 18, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member